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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1955

JOE GIBSON,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Joe Gibson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 19, 1956 (Petition for Rehearing in the said cause having been denied on May 23, 1956).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 367), printed in Appendix A hereto, infra, page 13, is reported in 232 Federal 2d 13.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 19, 1956. (R. 379; Appendix B, infra, page 25.) Rehearing was denied on May 23, 1956. (R. 404; Appendix B, page 26, infra.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may, in arriving at a decision on a case, under its appellate jurisdiction by virtue of diversity of citizenship of the parties, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as set forth by the highest court of the State?

2. Whether a Court of Appeals in an action under Federal jurisdiction by virtue of diversity of citizenship of the parties may disregard the jury's findings, which findings are supported by the evidence, and reverse the trial court's

judgment for the plaintiff, and render judgment for the defendant?

IV.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

Petitioner, Joe Gibson, brought this suit in the United States District Court for the Western District of Texas, Pecos Division, against Respondent, Phillips Petroleum Company, for damages for personal injuries sustained by

Joe Gibson based upon Respondent's failing to furnish Joe Gibson with a safe place to perform his work and in failing to warn Joe Gibson of the unsafe conditions existing. (R. 1-10.) The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Texas, and the defendant being a foreign corporation duly incorporated and organized under the laws of the State of Delaware. (R. 317-330.)

Mr. Cecil Parsons was rig superintendent for Phillips Petroleum Company. On one of the rigs under his supervision, Phillips wanted to convert a "mud house" into a "dog house." (R. 150.) In pursuance of this Parsons entered into a contract with one Grady Barrs to do such conversion work. (R. 150.) At that time Joe Gibson was in the employ of Mr. Barrs, and Mr. Barrs sent him out to do the conversion work. (R. 27.)

In connection with the making of the conversion contract, apparently nothing was said as to who was to furnish ladders or things upon which Barrs or his employees might have to stand. (R. 237.) However, even though Parsons testified that he did not know it would be necessary for the welders to stand on anything while working on the "dog house," he did know that in the course of the work that it would be necessary to have something to stand on and had talked about using oil barrels for this purpose. (R. 163.) Apparently Parsons contemplated using the oil barrels since he knew there was nothing in the "dog house" to stand on (R. 160) and there was nothing but barrels available for standing (R. 175).

Since Parsons knew that barrels would be used to stand on, he had the barrels which had contained gasoline and kerosene placed at one place on the location by the water tanks and had the oil barrels stacked between the dog house and the rig in order that the welders would get oil barrels to stand on rather than gasoline or kerosene barrels. (R. 156.) Parsons had this done because he had known of barrels blowing up before. (R. 157 and 162.) However, Mr. Barrs and his employees were not told which stack was which. (R. 174-175.)

Mr. T. J. Murray, Phillips' driller, testified that as a matter of practice whenever Mr. Barrs or one of his employees needed a barrel that Murray would go get it for him. (R. 175.)

In this connection Mr. Gibson testified that while converting the mud house that it was sometimes necessary to have something to stand on and that when it did become so necessary the Phillips people would provide something to stand on. (R. 32.) The first time that Joe Gibson was furnished a scaffold by Phillips was when a roughneck called "Red" got an oil barrel and set it up for him. At that time Mr. Gibson asked about the barrel's previous contents and the Phillips men told him that the barrels were water barrels. (R. 33.) Gibson continued to use these barrels during the conversion job, and when the rig and dog house were moved to another location, these barrels were moved by putting them in the dog house when the move was made. (R. 34 and 73.)

The day before he was injured Gibson worked on the dog house, and Phillips men worked with him. They furnished him a barrel to stand on at that time. (R. 36.) The roughneck by the name of "Red" furnished the barrel, which was a 55-gallon barrel and had the same appearance as the other ones upon which Gibson had worked. When Gibson left the job that day, the barrel that Gibson was using was left there by the dog house. (R. 36 and 37.)

On the morning of February 8, 1952, the day upon which Gibson was injured, he started to work cutting out some conduit pipe out of the top of the dog house in accordance with instructions given him by Mr. Parsons. The barrel that he had used the day before was available, being 3 or 4 feet from where he thought he had left it the day before, and he got it. (R. 38.) (Also R. 100-102.) Gibson had nothing at all to do with the selection of this barrel (R. 39) because the Phillips' boys handled the barrels and provided him with that barrel. (R. 114.) While Gibson was standing on this barrel using a cutting torch, the barrel exploded causing Gibson to sustain serious personal injuries. It later developed that the barrel's former content was kerosene.

In the stack of barrels which supposedly contained only oil drums there was at least one barrel which had contained kerosene, according to Phillips' roughneck, Red Koonz. (R. 303-304.) It was this stack that Parsons had intended to be used when it was necessary to obtain a barrel upon which the welders could stand. (R. 161.) According to Phillips' employees, all of the barrels looked alike including the one that exploded in that they were the same size, design and

color. (Parsons, R. 155-156; Murray, R. 169-173; Teakell, R. 293; Koonz, R. 313.) There was no marking on the barrel to warn Gibson of the contents of it. (R. 42.)

Further, according to Parsons (R. 155-156) and Koonz (R. 314-315), it was necessary to take the bungs out of the barrels and smell them before it could be determined what the contents had been. In addition Gibson testified that he could not have necessarily determined the contents of the barrel by smelling of it. (R. 104.)

It is true that Mr. Gibson knew that a barrel containing kerosene would be dangerous around a welding or cutting operation, but there was absolutely no showing that Mr Gibson knew that this barrel which exploded, which had been furnished by Appellant through its employees, contained such fumes and was thus dangerous nor was there anything about the drum which would raise any suspicion in his mind as to its former contents under the above described circumstances. Mr. Gibson testified that he had not been told of the contents nor was there any marking on the barrel which might reveal its former contents. (R. 42.) This was true even though Parsons was afraid that one of the welders might get hold of a kerosene barrel. (R. 292.)

Parsons testified that the whole premises including the supervision of the conversion job was his responsibility and under his supervision. Parsons did, in fact, check up on the welding job whenever he went on the location. (R. 270-271.)

Upon this and the other testimony adduced at the trial of this cause, together with the court's instructions, the jury

subsequently returned a verdict for Plaintiff assessing his damages at $40,000.00 (R. 317-330), and judgment was entered thereon (R. 355-358).

From the District Court's judgment Phillips Petroleum Company brought its appeal to the Court of Appeals for the Fifth Circuit, which Court disregarded the jury's findings to the effect that Phillips failed to furnish Joe Gibson with a safe place in which to do his work and that Joe Gibson was not contributorily negligent and rendered judgment for Phillips. (R. 379.)

VI.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The Court of Appeals correctly stated that the duty of the owner or occupier of land "does not extend to those invitees who know or should know of the existence of a particular condition, and who appreciate, or should appreciate its dangers." However, the Court of Appeals based its decision on its holding that a duty rested upon Gibson "to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances."

This is in direct conflict with the law of Texas as set forth by the Supreme Court of Texas in the recent case of *McKee General Contractor v. Patterson, 271 S. W. 2d 391,* which held that although an invitee is charged with knowl-

edge of those dangers which are open and obvious, that there is no obligation on the part of the invitee to inspect the premises in order to determine the existence of a dangerous condition. The Supreme Court of Texas further stated that "while he may not close his eyes to obvious dangers, he, (the invitee) has a right to assume that the premises are safe for his use."

Since the Court of Appeals did not follow the law of Texas, a typical situation is presented in which this Honorable Court has on a number of occasions granted Writs of Certiorari. *Erie R. Co. v. Tompkins, 304 U. S. 64; Russell v. Todd, 309 U. S. 280; Wichita Royalty Co. v. City National Bank, 306 U. S. 103; Guaranty Trust Co. v. York, 320 U. S. 99.* See also *Rules of Decision Act, U. S. C., Section 1652.*

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

As set forth in the statement hereof, the evidence clearly raised the issue of whether or not Phillips Petroleum Company failed to furnish Joe Gibson a reasonably safe place in which to do his work, from which evidence the jury was more than justified in making a finding favorable to Joe Gibson and was further justified in finding that Joe Gibson was not guilty of contributory negligence.

Although giving lip service to the general rule that the evidence must be viewed in the light most favorable to Gibson, the Court of Civil Appeals then proceeded to nar-

rate certain testimony which favored Phillips and was apparently considered by the Court as being undisputed. However, the evidence was disputed and, when viewed in the light most favorable to Joe Gibson, would show that the barrels used by Gibson throughout the job were furnished by Phillips employees; that Joe Gibson thought that the barrel which exploded was the same barrel which had been furnished by a Phillips employee the day before; that Gibson could not necessarily have determined the contents of the barrel had he smelled them; and Joe Gibson did not procure the drum, but merely used the drum which had been furnished him the day before. Under these facts the jury was certainly justified in finding that Gibson was not guilty of contributory negligence and that Phillips failed to furnish him a safe place in which to do his work.

These facts certainly present a situation in which this Honorable Court has on numerous occasions granted Writs of Certiorari, for the Court certainly invaded the province of the jury when it saw fit to substitute its own conclusions for that of the jury upon disputed facts. *E. G., Ives v. Grand Trunk R. Co., 63 S. Ct. 1077, 319 U. S. 372,* and *Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608.*

3. The questions here presented have great importance and far reaching effect.

Not only in the State of Texas, but in many other states, there are many, many thousands of individuals performing work for foreign employers, both individuals, firms and corporations. Of these numbers, a great number will un-

doubtedly be injured on premises occupied by the persons, firms, or corporations for whom they are laboring. Certainly, these individuals have the right to have the questions concerning liability for their injuries determined in accordance with the substantive law of the State in which they are working. They should not be subjected to the caprice of a Court of Appeals in connection with which the Court of Appeals is allowed to apply whatever rule it sees fit, regardless of the rule of the State forum, in determining the liability for such injuries.

This is particularly true at present in the State of Texas if the decision of the Court of Appeals is allowed to stand. If an individual is injured by the neglect of a foreign individual, firm, or corporation, then liability will be determined by one set of rules as decreed by the Court of Appeals, whereas if the negligence were attributable to a Texas individual, firm or corporation, the liability would be determined by still another set of rules as decreed by the Supreme Court of Texas. This situation is of such great importance that it should not be allowed to stand.

4. The decision of the Court of Appeals was clearly erroneous.

As is evident from the discussion of the foregoing reasons, the decision of the Court of Appeals was clearly erroneous, since the jury's findings that Phillips Petroleum Company failed to furnish Joe Gibson a safe place to work and that Joe Gibson was not guilty of contributory negligence were clearly supported by the evidence. Further,

under the evidence and the law of the State of Texas, the District Court correctly submitted such issues to the jury in its charge.

Therefore, for this reason alone, this Honorable Court should grant Petitioner's Petition for Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,
Appellant,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 19, 1956.)

Before BORAH, TUTTLE and JONES, Circuit Judges.

BORAH, Circuit Judge: Joe Gibson brought this suit against Phillips Petroleum Company, seeking damages for personal injuries sustained by him as the result of the explosion of a kerosene drum upon which he was standing while welding on Phillips' premises. Thereafter, Traders & General Insurance Company intervened, adopting the

pleadings of plaintiff.[1] In his complaint Gibson alleged that the defendant was guilty of negligence which approximately caused his injury. More specifically it was alleged that the defendant failed: (1) to furnish plaintiff with a reasonably safe place in which to do his work and with reasonably safe equipment; (2) to keep a proper lookout for the plaintiff; (3) to make reasonable inspection of the drum in question and to clean said drum and remove the fumes before furnishing it to plaintiff; (4) to tell the plaintiff that the drum in question contained explosive fumes; and (5) to warn plaintiff of the unsafe condition of the drum and of the unsafe condition of its premises.

At the trial the court charged the jury that if plaintiff knew or should have known of the dangers and risks to which he submitted himself, or if he failed to exercise ordinary care for his own safety, or if the injury was brought about by transitory conditions which arose during the progress of the work, or if plaintiff was guilty of contributory negligence, defendant would not be liable. But on the other hand, if the jury found that the defendant had negligently failed to provide plaintiff, a business invitee, with a safe place to work, and that such negligence proximately caused plaintiff's injury, defendant would be liable. The jury under the general charge of the court returned a verdict in favor of the plaintiff in the amount of $40,000, and this appeal is from the judgment which was entered thereon.

[1]Intervenor, the insurer of Grady Bars, welding contractor the employer of plaintiff, sought to recoup workmen's compensation payments made to plaintiff and attorney fees.

Appellant's principal assignments of error relate to the failure of the trial court to grant its motion for directed verdict and its motion for judgment n.o.v. In support thereof it is urged that appellant breached no duty owed by it to Gibson, in that it was under no duty to keep him from doing that which he knew better than to do nor was it under a duty to guard him against the hazards which he created; that Gibson voluntarily exposed himself to the dangers with which he became involved; that there was no evidence to show that the place of work was a proximate cause of his accident; that the whole of the evidence established that the accident occurred because of Gibson's own acts; and that Gibson was guilty of contributory negligence as a matter of law in that he exercised no degree of care whatever for his own safety. These assignments thus present two principal questions: first, whether appellant breached any duty owed to Gibson, and secondly, whether as a matter of law Gibson's injury proximately resulted from his contributory negligence.

On review of a case such as this, there are several considerations which must be kept in mind. It is well settled law that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that negligence and proximate cause are questions of fact to be properly submitted to and determined by jurors from a consideration of all the attending facts and circumstances. On a motion for a directed verdict, as well as on motion for judgment n.o.v., it is the duty of the court to accept as true all the facts which the evidence tends to

prove, and draw against the party making the motion all reasonable inferences most favorable to the party opposing the motion, and if the evidence is of such a character that reasonable men in an impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. *Swift & Co. v. Morgan & Sturdivant, 5 Cir., 214 F. 2d 115, 116.*

The evidence viewed in the light most favorable to appellee Gibson is as follows: In February, 1952, appellant, acting through its rig supervisor Cecil Parsons, and one Grady Bars, a welding contractor, entered into an oral contract, under the terms of which it was agreed that Bars was to convert a "mud house,"[2] into a "dog house,"[3] and then install it on appellant's active drilling rig No. 28. It was mutually agreed that appellant was to supply the needed steel and that Bars was to furnish the workmen, welding equipment and all things except the materials which were needed to do the work. At the time the contract was entered into no mention was made as to who was to furnish scaffolding or equipment upon which to stand when overhead welding work required such equipment. But anticipating that metal drums might be used for that purpose, Parsons as a precautionary measure ordered his employees to move all of the empty gasoline and kerosene drums away from the drilling rig and the site of the "dog house."

[2]A steel house, 28x7x7½ feet, used for storing drilling mud.
[3]A clothes-changing house for the driller.

When work under the contract began, Bars assigned Gibson to work with him on the conversion of the "dog house." Gibson, a former oil field worker, was an experienced welder and, among other jobs, had done welding work around oil rigs and in a high octane gasoline plant. The conversion work was started at one lease location, but before its completion, the "dog house" was moved to a flat piece of ground on or adjacent to the large caliche covered area on which rig No. 28 was located. By estimated measurement the "dog house" was placed 150 feet southwest of the rig and it was conceded at the trial that its placement at this point did not make Gibson's work either hazardous or dangerous.

At the first location where a part of the conversion work was performed, Bars furnished four or five metal water barrels or drums on which to stand while welding overhead. These "bent up" drums, which had originally been used as oil drums, had been picked up by Bars in January, 1952, on a previous welding job. And when the "dog house" was moved Bars carried these drums in his truck to the new location where they were used for the purpose aforementioned during the first few days of work.

On the morning of February 7, 1952, which was the day immediately preceding the accident, Gibson performed welding work on both the inside and outside of the "dog house." The work which he did on the outside was overhead work on the new doors which had been cut in the north and south sides of the structure. Gibson testified that "Red" Koonz, one of appellant's employees whose

services when needed had been made available to him, had that day procured a drum on which he stood while working overhead; and that upon completion of this work he left the drum on the north side of the house where he had been working. It further appears from the uncontradicted evidence that at least two of Bars' water barrels had on that day been left in place on the west side and about 2½ feet away from the "dog house."

On the afternoon of the same day, Gibson did some work on the derrick in connection with the installation of the "dog house," and on that occasion, he procured a drum from Koonz and stood on it while working overhead. At the close of the day, the drum on which he had stood that afternoon was left under the derrick floor which was approximately 150 feet away from the "dog house."

On the following morning, the day of the accident, Gibson and Bars arrived at the job site in separate trucks. They knew that an overhead pipe was to be cut out of the "dog house" before it was lifted into place on the derrick and each "unrolled" his electric welding equipment preparatory to going to work. Bars intended to do this "two or three minute" job alone, and had placed a 5-gallon bucket on the porch at the north doorway on which to stand while doing the work. But having forgotten his welding goggles he returned to his truck to get them. Gibson, unaware of Bars' intentions, concluded that he would do the work, but found the bucket too low for his use. Whereupon he stepped off the porch and walked eight or ten feet toward the der-

rick where he found a 55-gallon metal drum which, unknown to him, had last contained kerosene. He carried this drum to the porch of the "dog house," stepped upon it with the aid of the bucket and began cutting out the pipe with his electric welder. Thereupon, sparks or flame from the falling slag or metal which he was cutting ignited the fumes from the empty drum and a violent explosion occurred which resulted in the injuries complained of.

The drum which exploded was the property of Johnson Brothers, the oil jobbers who furnished the motor oil, gasoline and kerosene which appellant used in connection with its operations at the drilling rig. Gibson testified that he did not think that the drum was one of the water barrels which Bars had originally provided, or that it was the drum which had been provided by Koonz for the work which he had done on the derrick. But on the contrary, he thought that the drum which he picked up was the same one on which he had stood while working on the "dog house" the previous day, although he frankly admitted that it was three or four feet away from the place where he thought he had left a drum on the preceding day.

The evidence in this record is all one way and to the effect that Gibson knew that petroleum fuels were required for the drilling of the nearby well; that such fuels would be transported to the location in drums; that it was to be expected that empty fuel drums would be around active drilling rigs; that these drums would be empties for gasoline, kerosene and motor oil; that "empty" drums were more likely to have fumes in them than full ones; that the

fact that they were "empty" would make them all the more dangerous; and that it would be dangerous to have a flame around an oil, kerosene or gasoline drum. Despite this knowledge and under the circumstance which we have detailed above Gibson testified that he picked up a drum which looked like the one he had used the day preceding the accident but that he did not exercise his sense of smell to determine its former contents; nor did he examine the drum to ascertain whether the two-inch and one-inch openings which were located on one end of the drum were open or closed, but that he simply set the drum in place for use with the "bung holes" down.

Thus, it is clear from the evidence that Gibson alone procured the kerosene drum, and that no employee of appellant directed him to it or suggested its use. Indeed, no employee of appellant had on that day visited the scene of the accident prior to its occurrence.

Under Texas law, by which we are bound, the burden was on Gibson to prove his case. To discharge that burden it was necessary that he adduce evidence showing not only that appellant was negligent in the sense that he created or maintained a condition on the premises giving rise to an unreasonable risk of injury to persons thereon, but also that as to the class of persons to which Gibson belonged there was a breach of duty. It follows that we must first determine whether in this case there was evidence to support a finding of a breach of duty by the appellant before we reach the other questions presented by the defenses of voluntary exposure to risk and contributory negligence.

In our approach to the immediate problem at hand, we have read numerous Texas cases, such as *Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S. W. 2d 625, 628*, wherein the courts have had occasion to consider whether a landowner was liable to an invitee for injuries sustained on the premises, and we have noted that in speaking of the duty of an owner or occupier of land, the courts have frequently said that the duty is "to use ordinary care to keep the premises in a reasonably safe condition so that the person invited will not be injured." "But," as was pointed out in *McKee, General Contractor v. Patterson, 271 S. W. 2d 391, 393*, that phraseology "is only a simplified statement of the duty sufficient to meet the problems presented in the particular cases," and this statement is subject to certain qualifications not therein expressed in that it is now well established in Texas that the duty of the owner or occupier of land "does not extend to those invitees who know or should know of the existence of the particular condition and who appreciate or should appreciate its dangers * * *. What the qualification means, of course, is that inasmuch as the invitee has knowledge of the dangers there is no duty on the owner to warn him of them. It means also that if, having knowledge of the dangers, the invitee exposes himself to them he must take the premises as he finds them and there is no duty on the owner to protect him even by the use of reasonable precautitons to eliminate the hazards."

Accordingly, in order to fasten liability on the owner or occupier of land, it must first be established that he knew

or should have known of the existence of the condition and that he should have appreciated its dangers. Once this is established, it is necessary to determine what was known and appreciated, or should have been fully realized and appreciated by the invitee. In some cases, the existence of the condition may be so open and obvious and the dangers in it so apparent that the court may say *as a matter of law* that the invitee should have known of and appreciated them. *McKee, General Contractor v. Patterson*, supra, *United Gas Corp. v. Crawford, 172 S. W. 2d 297; Beeville Cotton Oil Co. v. Sells, 84 S. W. 2d 575.* But in others, whether the condition was such that the invitee should have known of its dangers may present a fact question for the jury. *Crow v. Continental Oil Co., 115 F. 2d 740; Smith v. Henger, 226 S. W. 2d 425; McAfee v. Travis Gas Corp., 153 S. W. 2d 442.*

In the case at bar, the evidence clearly shows that appellant was cognizant of the dangerous condition. Indeed, it took affirmative steps to remove the gasoline and kerosene drums from the immediate vicinity of the work place so that they would not be used in connection with the welding operations. Likewise, Gibson's own testimony, by which he is bound, clearly established that he was also aware of the danger involved in using drums which might be found on the premises of an active drilling rig and that he fully appreciated the danger of using a cutting torch around a drum which had had either gasoline or kerosene in it, and yet he picked up a drum on the premises, concededly not in the identical place where he had previously left a drum, and

used it without any examination whatever to determine its former contents and without even observing whether the openings therein were closed. The issue here, then, is narrowed to this: when both Gibson and appellant were fully aware of these dangers, did appellant breach any duty it owed to Gibson? The qualification, above noted, to the general rule of duty to use ordinary care to protect invitees from injuries resulting from unsafe conditions, exists only when the invitee, confronted with the existence of a condition of which he knows and containing dangers which he appreciates, voluntarily encounters them. We hold that Gibson here made such a choice, voluntarily encountering the danger, and consequently, under Texas law, appellant breached no duty to him.

Moreover, the evidence which we have detailed above establishes as a matter of law that Gibson's own negligence was the sole proximate cause of his injury. It is a well-established rule of law that a duty rests upon everyone to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence. *United States Gypsum Co. v. Balfanz, 5 Cir., 193 F. 2d 1, 4.* If Gibson had taken some precaution and care for his own safety, it would have been for the jury to determine whether he had exercised such care as an ordinary prudent person would have exer-

cised under like or similar circumstances to avoid receiving the injury. But here it is clear that he took no care whatsoever. Consequently, the matter was not for submission to the jury but should have been disposed of by the court by an instructed verdict.

It was error to refuse to direct a verdict for appellant and because of that error, the judgment of the District Court is reversed and judgment is here rendered for appellant.

REVERSED AND RENDERED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

JUDGMENT

Extract from the Minutes of April 19th, 1956.

No. 15653

No. 15,653

PHILLIPS PETROLEUM COMPANY,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and judgment is here rendered for appellant, Phillips Petroleum Company;

It is further ordered and adjudged that the appellees, Joe Gibson and Traders and General Insurance Company, Intervenor, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

ORDER DENYING HEARING

Extract from the Minutes of May 23rd, 1956.

PHILLIPS PETROLEUM COMPANY,

versus

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY, Intervenor.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Office - Supreme Court, U.S.
FILED
AUG 21 1956
JOHN T. FEY, Clerk

No. 339

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,

Appellant,

v.

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,

Appellees.

Appeal from the District Court of the United States, for the Western District of Texas, Pecos Division

APPELLEES' PETITION FOR A REHEARING AND MOTION FOR PERMISSION TO FILE ARGUMENT IN SUPPORT THEREOF

U. S. COURT OF APPEALS
FILED
MAY 10 1956
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CLERK

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PHILLIPS PETROLEUM COMPANY,
Appellant,

v.

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,
Appellees.

Appealed from the United States District Court for the Western Division of Texas, Pecos Division

---

APPELLEES' PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Appellees, Joe Gibson and Traders and General Insurance Company, and file this their Petition for a Rehearing and respectfully move this Honorable Court to set aside and vacate the decision heretofore made and Judgment heretofore entered on April 19, 1956, in the

above entitled and numbered cause, and to grant them a rehearing, and as grounds therefor assign error as follows:

1.

Although professing to view the evidence in the light most favorable to Appellees and to draw against Appellant all reasonable inferences most favorable to Appellees, this Honorable Court erred in erroneously viewing the evidence in the light most favorable to the Appellant and drawing in favor of Appellant all inferences most favorable to Appellant; for when properly viewed, the evidence as found by the trial court and jury showed that Appellee Gibson did not know, nor should he have known, of the dangers existent by reason of the former contents of the barrel which exploded and further showed Appellee, Gibson, exercised sufficient care for his own safety to avoid being chargeable with contributory negligence.

2.

This Honorable Court erred in finding that Appellee Gibson alone procured a kerosene drum and that no employee of Appellant directed Gibson to it or suggested its use, for the evidence showed that Appellant's employee, Koonz, had furnished to Gibson this particular drum which exploded on the day preceding the explosion and that therefore Gibson did not himself procure the barrel but was merely using the barrel furnished by Appellant for Gibson's use.

3.

This Honorable Court erred in finding that Gibson exercised no precaution or care for his own safety, since he had inquired as to the contents of the barrels furnished by Appellant and had been told they contained water; the barrel that exploded had the same appearance as those furnished by Appellant to Gibson; and the barrel that exploded had been furnished by Appellant to Gibson and was used by Gibson the day before.

4.

This Honorable Court erred in holding that since Gibson had general knowledge of the conditions existing around a drilling operation including the usual existence of kerosene barrels on the premises, then by virtue of such general knowledge Gibson knew that the barrel which exploded was dangerous and Gibson voluntarily encountered such danger when the evidence showed to the contrary that Gibson did not know, nor should he have known, of the dangerous condition of the particular barrel which exploded.

5.

This Honorable Court erred in applying the rule that an invitee is owed no duty with reference to a dangerous condition which the invitee knows or should have known, since this rule applies only to an open and obvious danger which the condition of the barrel was not, for otherwise an invitee has the right to assume that the premises are safe for his use.

6.

This Honorable Court erred in holding that "a duty rests upon everyone to exercise his intelligence to the fullest extent and to make such use of his external senses in the interest of his own safety as is reasonable under the circumstances and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence," since this is not the law of Texas as set forth by the Supreme Court of Texas and approved by this Honorable Court and further since there is no showing that Gibson could have determined the former contents of the barrel had he made a minute sensory inspection.

7.

This Honorable Court erred in reversing and rendering this case on the basis that the case should not have been submitted to the jury and that Appellant's Motion for Instructed Verdict should have been granted for the reasons set out in the above assigned errors.

WHEREFORE, Appellees' pray that this Petition for Rehearing be granted and that the Judgment heretofore entered by this Honorable Court on April 19, 1956, reversing the Judgment of the Trial Court and rendering Judgment for Appellant be set aside and that the Judgment of the Trial Court be affirmed inasmuch as Appellees' respect-

fully contend that a gross miscarriage of justice would otherwise result as is hereinabove set out.

Respectfully submitted,

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By: .....
Attorneys for Appellees.

Henry D. Akin, Jr., Counsel of Record for Appellees' in the above entitled and numbered cause, does hereby certify that the above and foregoing Petition of Appellees for a Rehearing of said cause is filed in good faith and not for delay and is believed by him to be meritorious.

Served on Appellant, Phillips Petroleum Company, by mailing copies thereof to Rayburn L. Foster, Esquire, Bartlesville, Oklahoma, and Carl W. Jones, Esquire, Box 791, Midland, Texas, and Raymond A. Lynch, Esquire, Box 913, Midland, Texas, and Harry D. Turner, Esquire, Bartlesville, Oklahoma, and Layton A. Webb, Esquire, Box 791, Midland, Texas, and William L. Kerr, Esquire, Turpin, Kerr & Smith, Box 913, Midland, Texas.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,653

PHILLIPS PETROLEUM COMPANY,

Appellant,

v.

JOE GIBSON and TRADERS AND GENERAL INSURANCE COMPANY,

Appellees.

Appeal from the District Court of the United States, for the Western District of Texas, Pecos Division

---

APPELLEES' MOTION FOR LEAVE TO FILE ARGUMENT IN SUPPORT OF ITS PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Joe Gibson and Traders & General Insurance Company, Appellees in the above entitled and numbered cause, by their attorneys and respectfully move the Court

for leave to file the following argument in support of their Petition for Rehearing, to-wit:

STATEMENT

Part of the evidence relied upon by Appellees' which conclusively establish liability on the part of Appellant and upon which evidence the jury reached its verdict in favor of Appellees, and upon which evidence the Trial Court rendered its Judgment, and upon which evidence this Honorable Court should affirm the Trial Court Judgment, is as follows:

Appellee Gibson testified as follows on Direct Examination:

Page 33 of the record:

"Q. When you were first furnished that drum as a platform to work on did you make any inquiry about what had been its contents previous to its being used as a platform to work on?

"A. Yes, sir.

"Q. Who did you ask?

"A. I asked two boys who were standing there.

"Q. Were they Phillips men?

"A. Yes, sir.

"Q. What did they say?

"A. They said it was water drums.

"Q. Were there any other drums around there in the Phillips location?

"A. I didn't notice any, no, sir.

"Q. Did you continue to use the drums they had furnished you as long as you worked there during this conversion job?"

Page 34 of the Record:

"A. Yes, sir. We moved them. They moved them in the doghouse. They put them in the doghouse and moved them in the other rig when they moved the rig.

"Q. Did all the drums have the same appearance?

"A. Yes, sir.

"Q. Any identifying marks on them at all?

"A. Not as I saw them, no, sir.

"Q. Did the Phillips men work with you when you were using the drums as a platform to work on?

"A. Yes, sir."

Page 36 of the Record:

"Q. Had you done any work on it at all on February 7th?

"A. Yes, sir.

"Q. What work had you done?

"A. Well, I had welded up, I had built some closets for the boys to hang their clothes in.

"Q. Inside?

"A. Yes, sir, inside. And, I don't know. I didn't do all of it that day, but I was working on that, and then they got a long tool box on one side that they put their tools in, and then another little box that I was working on.

"Q. Well, you built all of that inside of the dog house?

"A. Yes, sir.

"Q. According to Mr. Partsons' specifications?

"A. Yes, sir.

"Q. Did any (sic) Phillips' men work with you on the dog house that day, February 7th?

"A. Yes, sir.

"Q. Was it necessary to do any work overhead that you couldn't reach standing?

"A. Yes, sir.

"Q. Were you furnished any kind of a platform to stand on that day?

"A. Yes, sir.

"Q. What?

"A. A Drum.

"Q. By whom, one of the roughnecks?"

Page 37 of the Record:

"A. Yes, sir.

"Q. Do you know which one?

"A. That little 'red' fellow.

"Q. The red-headed boy, the one that was working with you on the 7th?

"A. Yes, sir.

"Q. Now what kind of a drum?

"A. It was just a drum.

"Q. What size?

"A. A fifty-five gallon.

"Q. It had the same appearance as the other ones that you had worked on?

"A. Yes, sir.

"Q. Was there any board on the drum that day or was it a single drum?

"A. It was a single drum, yes, sir.

"Q. Was Mr. Bars out there on the 7th, your employer?

"A. No, sir, not that I can recall.

"Q. Pardon me?

"A. Not that I can recall. I don't think he was out there at all.

"Q. Were you or not the only employee of Mr. Bars working on that conversion job on February 7th?

"A. Yes, sir.

"Q. Did he have any other employees working for him anywhere?

"A. No, sir.

"Q. Now did you leave the job on the 7th and come back on the 8th?

"A. Yes, sir.

"Q. When you left the job was the drum that you had been using left there?

"A. Yes, sir.

"Q. Where was it left? I mean, the one that you were using on the doghouse, where was it left?"

Page 38 of the Record:

"A. Right where I had been using it by the side of the doghouse.

"Q. Where did you begin working when you got there on the morning of February 8th?

"A. Well, Cecil had told me, Mr. Parsons had told me that he wanted some conduit pipe cut out of the top.

"Q. Of the dog house?

"A. Yes, sir. And I had started cutting on it.

"Q. He told you what he wanted cut, but did he ever tell you how he wanted it cut?

"A. No, sir.

"Q. And did you start to do that?

"A. Yes, sir.

"Q. Could you reach that?

"A. No, sir.

"Q. Was the drum available?

"A. Yes, sir.

"Q. Did you get it?

"A. Yes, sir.

"Q. Was it in the same place you had left it?

"A. Yes, sir. Close to it, probably, it might have been three or four feet from where I thought I left it.

Page 39 of the Record:

"Q. Did it look like the same drum you had used the day before?

"A. Yes, sir.

"Q. Did you have anything to do at all with the selection of the drum to stand on?

"A. No sir."

Page 42 of the Record:

"Q. Was there any markings on the drum to warn you of what it had in it, such as writing on it or stenciling?

"A. No, sir."

On Cross Examination, Appellee, Gibson, testified as follows on page 103 of the Record:

"Q. I see. Now, as to the barrel or drum that you used, did you make any examination of it at all to

determine whether the holes were closed on the open end?

"A. No, sir.

"Q. Well, you are not telling the jury whether it was either open or closed?

"A. No, sir.

"Q. You don't know?

"A. No, sir.

"Q. Now, you could have very easily looked and seen about that, couldn't you?"

Page 104 of the Record:

"A. Yes, sir, but I thought it was the drum that I had been using. I didn't think it was necessary.

"Q. But my question was you could have easily looked to tell, couldn't you?

"A. Yes, sir.

"Q. And you didn't look?

"A. No, sir.

"Q. And you didn't try to look?

"A. No, sir.

"Q. Now, had the drum been opened you could have smelled to see what kind of a product had been in there, couldn't you?

"A. Not necessarily, no, sir.

"Q. You mean that you can't sniff a barrel and tell whether it is an oil barrel or a kerosene barrel or a gasoline barrel?

"A. It is hard to do, sir."

On Re-Direct Examination Appellee, Gibson, testified as follows on page 114 of the Record:

"Q. Had the drum—strike that. Had you used a drum on the doghouse the day before?

"A. Yes, sir.

"Q. Who got the drum for you the day before?

"A. It was one of those Phillips boys.

"Q. And the drum that you used on the 8th, did it look like, exactly like the drum you had used the day before?

"A. Yes, sir.

"Q. Had anything happened while you were on the drum the day before, any danger of explosion or anything?

"A. No, sir.

"Q. Did you know that this drum on which you were standing February 8th had fumes in it?

"A. No, sir.

"Q. Did you ever have anything to do with the handling of those drums or emptying the contents from the drums into any supply bins that Phillips had?

"A. No, sir.

"Q. Who did that?

"A. The Phillips hands.

"Q. Now, Mr. Kerr asked you whether or not there was any danger there or had been. I will ask you if the drum had not contained explosive fumes whether or not there would have been any danger on earth in you using a cutting torch on that pipe?

"A. There was not, sir."

In order to give this Honorable Court an example of Appellant's evidence, Appellees would respectfully show that Appellant's driller, T. J. Murray, testified in part as follows, page 169:

"Q. All the same kind of drums from outward appearances?

"A. Yes, sir.

"Q. Any identifying marks on them?

"A. No, sir.

"Q. Mr. Gibson had been working out there for several days before this happened, had he not?

"A. Yes, sir, as well as I remember, around four or five days, maybe a week.

"Q. What kind of work had he been doing?

"A. Welding.

"Q. Welding what?

"A. He was welding on this doghouse, remodeling it.

"Q. Did he also do some cutting on the rig floor there, to have a place to put the converted doghouse when it was completed?

"A. Yes, sir.

"Q. What was furnished him to stand on when he had to weld or cut above his head?

"A. We furnished him an oil drum.

"Q. And that was one just like the one that blew up?

"A. It was the same thing, yes, sir."

Page 170:

"Q. What did you all help him do?

"A. Well, get him something to stand on, or they might hold a piece of metal while he welded it or cut if off, where it wouldn't fall, something like that."

Page 171:

"Q. Now where did you get the oil drum that was furnished the welder when he had to stand on it? Was it from the stack out there?

"A. Yes, sir.

"Q. Did you yourself get it from him or have one of the roughnecks?

"A. Had one of the roughnecks."

Pages 174 and 175:

"Q. You, yourself, Mr. Murray, didn't ever go to the trouble of telling Mr. Bars which stack was which because you always got the barrel for him, didn't you?

"A. Yes, sir.

"Q. And I suppose that it would also be true that you never did tell Mr. Bars' employee, such as Mr. Gibson or whatever welder he had out there, which stack was which because if he needed one, you would go get it for him?

"A. Yes, sir."

ARGUMENT AND AUTHORITIES

Without question the Texas law as set forth in *McKee, General Contractor v. Patterson, 271 S. W. 2d 391 (Supreme Court of Texas)*, which case was cited with approval by this Honorable Court in the case of *Sun Oil Company v. Pierce, 224 Federal 2d 580*, should be controlling here. In the *Pierce* case this Honorable Court held as follows:

"We recognize the law in Texas to be as stated in Robert E. McKee, General Contractor v. Patterson, Tex. 271 S. W. 2d 391-393, that the duty owed by a general contractor to employees of a sub-contractor is similar to that owed by an owner or occupier of land to his invitees, and does not extend to those persons who or should know of the existence of a particular condition, and who appreciates or should appreciate its dangers. The same knowledge and appreciation of danger on the part of the employee of the sub-contractor, which negatives any initial duty

owed to him by the general contractor, may also be the basis of the affirmative defenses of voluntary exposure to risk and contributory negligence.

The Texas Supreme Court held further as follows in the *McKee* case, to wit:

> "In all such cases, knowledge of the existence of the condition and appreciation of the danger therein by the parties are important factors in determining liability, but the rule for determining whether the parties should have known of the condition and appreciated its dangers is not always the same as to each. *The owner is charged with knowledge of any dangerous condition that a reasonable inspection would reveal because his duty to keep his premises in a reasonably safe condition for use by his invitees includes a duty to inspect.* Smith v. Henger, Supra; R. E. Cox Dry Goods Co. v. Kellog, Tex. Civ. App., 145 S. W. 2d 675, writ refused. *There is no such obligation on the invitee.* Peck v. Peck, 99 Tex. 10, 87 S. W. 248; Triangle Motors of Dallas v. Richmond, Texas, 258 S. W. 2d 60, 63. *While he may not close his eyes to obvious dangers, he has a right to assume that the premises are safe for his use.* Blanks v. Southland Hotel, Inc., 149 Tex. 139, 229 S. W. 2d 357, 360; Triangle Motors of Dallas v. Richmond, supra; Restatement of Torts, Vol. 2, Secs. 343a and 343d." (Italics added.)

The holding in the case of the *U. S. Gypsum Company v. Balfanz, 193 Federal 1,* conflicts somewhat with the law as above declared by the Texas Supreme Court as being the Texas law, and the Texas law should certainly control here. The Court in the *Balfanz* case did hold that an invitee must use his external senses to discover any existing dangerous conditions with the Court basing this holding not on

a Texas, but upon a Missouri case. Thus, this is not the law in Texas but, to the contrary, the law of Texas is declared by the Supreme Court of Texas, that an invitee "may not close his eyes to obvious dangers," but, "he has the right to assume that the premises are safe for his use and he does not have any obligation to make an inspection to determine the safety of the premises."

When the Texas law is applied to the evidence as above set forth, the conclusion is inescapable that this Honorable Court erred in holding that the Trial Court should have granted Appellant's Motion for Instructed Verdict. Appellant's employee on the day preceding the explosion in question furnished Gibson with a barrel upon which to stand while doing welding and cutting work on the "doghouse"; previously Gibson had inquired as to the former contents of the barrel furnished to him by Appellant's employee, and he was told that they contained water; the drum furnished Gibson the day before the explosion had the same appearance as the others furnished him, and none of the barrels had any markings or other distinguishing characteristics to their former contents; Gibson further testified that he could not have necessarily determined the former contents of the barrel by smelling it because it was very hard to do.

On the morning of the explosion Gibson picked up what he believed to be the same barrel furnished him the day before by Appellant's employee for the use in welding and cutting on the doghouse. Obviously, Gibson did not know

of the dangerous condition of this particular barrel which is the thing in question, not the condition of other barrels which might be found around the drilling premises. Under the Texas law Appellant would be relieved from its duty to furnish Gibson with a safe place to work by virtue of Gibson voluntarily encountering such danger only if Gibson knew of the dangerous condition of the barrel, which he did not, or should have known of the dangerous condition. Further, under the Texas law Gibson should have known the dangerous condition of the barrel only if the dangers were open and obvious. Particularly in view of the barrels having been furnished by Appellant through its employee, its having the same appearance as those which Gibson had been told were water barrels, its having no markings to indicate its former contents and its having contained a substance which Gibson could not have recognized by smell (Gibson could not have even smelled the contents without having had to do some work on the barrel in removing the bungs); Gibson certainly should not have known of the dangerous contents of the barrel since such dangerous condition was not open and obvious but extremely latent and concealed. In this connection Appellant again respectfully points out that under the Texas law Gibson was under no duty to make an inspection of the barrel and had the right to assume that the premises were safe for his use; therefore, since Gibson did not voluntarily expose himself to a danger which was known or should have been known to him, there was nothing to relieve Appellant's breach of its duty to furnish Gibson a safe place in which to work. This Honorable Court erred in holding to the contrary.

For essentially the same injuries the jury was supported in its findings that Gibson was not guilty of contributory negligence as stated by this Honorable Court; the inquiry is whether or not Gibson exercised any care or precaution for his own safety. Under the evidence as above presented most certainly he did from the very start of the job. When Appellant's employee first furnished barrels for Gibson to stand on, Gibson inquired and was told that the barrels furnished were water barrels. On the day preceding the explosion Appellant's employee furnished Gibson with a barrel which from all appearances was a barrel just like the ones he was told were water barrels, and on that date he used the barrel in complete safety. On the morning of the explosion Gibson started to do some work which he had been instructed to do the evening before by Appellant's tool pusher, Mr. Parsons. Gibson found he needed to elevate himself to do this work. Logically he used the barrel which had been furnished by Appellant's employee the day before for such use, which barrel had the same appearance as the water barrels furnished him and which had been used in safety the day before. Therefore, Gibson did exercise care and precaution for his own safety and the jury was fully justified in finding that Gibson was not contributorily negligent, and this Honorable Court erred in holding that this matter should have been disposed of by instructed verdict.

An extremely serious question is raised when a Court determines that a case should not be submitted to the jury and that an instructed verdict should be granted. The

Supreme Court of the United States realizes this to the fullest extent, and in a very recent opinion the Supreme Court discussed the question fully. In fact the Supreme Court felt so keenly about the matter that it distributed to each of the United States District Courts a copy of the opinion in advance of its publication. This opinion was handed down in the case of *Alma Schulz, Administratrix of the Estate of August M. Schulz v. The Pennsylvania Railroad Company, U. S. (April 9, 1956), Certiorari granted 350 U. S. 882.* The facts of the *Schulz* case are that Petitioner's husband, while employed by the railroad as a tug fireman, was drowned with the alleged cause being the negligent failure of the railroad to provide him with a safe place to work.

In this connection the Supreme Court stated as follows:

> "While some facts were in dispute there was evidence from which a jury could have found: On Christmas Day, 1949, at about 5:15 P. M. the deceased, Schulz, reported for work on his job at Pier H, Jersey City, New Jersey, and was assigned to work on four tugboats docked side by side there. He went immediately to check the boats without waiting to change from his street to his working clothes. Returning to the pier alongside the tugs about seven o'clock, Schulz reported that he had finished his checking and was now going back to the boats to change to his work clothes and proceed with his other duties there. He was last seen alive walking in the direction of the nearest tug at 1:25 a.m., a supervisor found Schulz was not on the boats. His street clothes were hanging in the upper engine room where the tug attendants usually changed clothes. His lunch package was also there. Three of the tugs were at all times wholly unlighted and dark; one was partially illumi-

nated by spot lights from the pier. The night was cold—10 above zero—and there was some ice on the tugs. Because the company did not have enough workers that night properly to perform the duties that were required Schulz had to try to take care of all four tugs by himself. To do this he had to step from one boat to another in the dark except for such limited illumination as he could obtain from a flashlight. Several weeks after Schulz disappeared from the boats his body was found in the water near an adjacent pier. He was clothed in nothing but shorts and socks. A flashlight was in his HAND. He had drowned. It is conceded that the deceased was not under the influence of alcohol when he came to the boat, that he did not commit suicide, that there was no foul play, and that he met his death by accident. The evidence showed that he was a capable and experienced workman who had been employed by the defendant for several years."

Upon this evidence the Trial Court directed the jury to return a verdict for the Defendant. In holding that the Trial Court should have submitted the case to the jury and in reversing the Trial Court's Judgment the Supreme Court held as follows:

"The jury trial 'is part and parcel of the remedy afforded railroad workers under Employers' Liability Act,' which the Jones Act makes applicable to those working as petitioner's husband was here. The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' We granted certiorari to consider the failure of the District Court to let this case go to the jury. 350 U. S. 882.

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind

that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & C. R. Co., 128 U. S. 443, 445 (1888).

"The very essence of its (the jurys') function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Under the evidence presented in the instant case certainly the Trial Court correctly let the case go to the jury and the jury to paraphrase the Supreme Court, reached its "conclusions" on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statement by writs of proof of circumstances from which inferences can generally be drawn to the effect that Appellant breached its duty to Gibson to fur-

nish him a safe place in which to perform his duty proximately causing his injuries which injuries were not contributed to by any negligence on the part of Gibson. Certainly the *Schulz* case is a much weaker case on those facts than the one here presented, and the evidence as presented by the Appellees' more than support Appellants earnest contention that the Trial Court correctly rendered Judgment for Appellees and that this Honorable Court erred in reversing the Trial Court's Judgment and rendered Judgment for the Appellant.

WHEREFORE, Premises Considered, Appellees respectfully pray that they be permitted to file this Argument, and that its Petition for Rehearing be granted and that the Judgment of this Honorable Court be vacated and that the Judgment of the Trial Court be affirmed.

Respectfully submitted,

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By .....
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Of Counsel:
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CERTIFICATE

A copy of the foregoing brief has been deposited in the United States mail in a properly stamped envelope, addressed to counsel, as follows: Rayburn L. Foster, Esquire, Bartlesville, Oklahoma, and Carl W. Jones, Esquire, Box 791, Midland, Texas, and Raymond A. Lynch, Esquire, Box 913 Midland, Texas, and Harry D. Turner, Esquire, Bartlesville, Oklahoma, and Layton A. Webb, Esquire, Box 791, Midland, Texas, and William L. Kerr, Esquire, Turpin, Kerr & Smith, Box 913, Midland, Texas.

FILED
SEP 15 1956
JOHN T. FEY, Clerk

No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1956

JOE GIBSON,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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WARLICK LAW PRINTING CO. — 1207 HORD STREET — DALLAS — RI-6711

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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1956

JOE GIBSON,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 232 Fed. 2d 13.

QUESTIONS PRESENTED

1. Did Respondent breach any duty it owed to Petitioner?

2. Did Petitioner voluntarily expose himself to the danger which he had created, and thereby assume the risk with which he became involved?

3. Did Petitioner so fail to exercise care for his own safety as to make his negligence the sole or proximate cause of his accident?

STATEMENT OF THE CASE

Petitioner obtained judgment against Respondent in the trial court based solely on the claim submitted to the jury that Respondent had failed to furnish Petitioner, an employee of an independent contractor, with a safe place to work (R. 321-322), the claim which Petitioner himself had refuted by his testimony (R. 77, 80, 81).

In Respondent's appeal from the trial court judgment, the Fifth Circuit Court of Appeals held that the uncontradicted proof, including that from Petitioner, disclosed that Respondent had violated no duty it owed to Petitioner; that the doctrine of *volenti non fit injuria* was in bar of Petitioner's recovery; and, that it was actually Petitioner's failure to take any precautions or observe any care toward his safety which proximately caused his accident and injuries. Accordingly the Court of Appeals reversed the trial court judgment and rendered judgment in favor of Respondent.

Petitioner, admittedly, was the employee of an independent contractor who had been employed to convert a "mud" house to a "dog" house. Welding work only was involved (R. 70), and the contractor and Petitioner, his skilled and experienced employee, had commenced completion work when accident occurred.

The place of work which was furnished by Respondent was a flat piece of ground (R. 7) well removed from a drilling location where an oil well was being drilled (R. 76). There was nothing hazardous about the place of work

(R. 80). It was the work being performed and more especially the improper use of a barrel, one which Petitioner selected in preference to a standing bucket furnished by Petitioner's contractor employer, that caused the injuries. Petitioner testified that his place of work had nothing to do with his accident (R. 81).

The day of accident Petitioner came to his job location with his employer to there "cut out" a piece of conduit pipe which was over-head. This work would have required but two or three minutes (R. 95), and then the converted mud house could have been moved into to become a part of the nearby derrick. Petitioner's employer intended to do this work himself, and this employer had provided a bucket to stand on to do the work just overhead. The contractor left the work place for a moment to find his welding glasses. In the few minutes of his absence Petitioner came upon the scene and decided to do the work. He found the bucket in position to be of an inadequate height. He therefore went from the porch toward the oil well drilling nearby and picked up an unexamined empty barrel (R. 102) and carried it back to where the bucket was. He put the barrel of his selection in position by the bucket and then climbed on top of "his" barrel (R. 106). He commenced his welding work and explosion occurred.

Petitioner testified he had had varied and long experience around oil wells. He knew that the drilling of such wells required fuel for drilling operations. He knew that fuel gasoline, kerosene and oil would be brought to the

drilling location in barrels, and that full and empty gasoline, kerosene and oil barrels were to be expected to be found around or near any drilling well location (R. 67). He knew how dangerous it was to do what he did (R. 68) and he testified he knew that if he did as he did an explosion would occur (R. 68, see also pp. 90, 104). Petitioner testified that although he could have examined the barrel of his selection, he did not attempt to look at the barrel to determine its former contents, nor did he smell of it to determine what it had held (R. 104). He but put the barrel in his use without making any test of it at all (R. 106) and with full knowledge of how dangerous it was for him to do what he was doing (R. 68).

The barrel which exploded did not belong to Respondent. It was owned by Johnson Brothers (R. 248, 154, 161, 172) who supplied fuel for the power in the drilling rig. It was not furnished to Petitioner for his use. Petitioner "saw this barrel" and "went and got it" and put it in position and use "without making any test of it at all" (R. 106). It was Petitioner's claim that on other occasions Respondent had furnished something on which to stand. The standing place, when furnished, had been safe, but on the day of accident Petitioner testified no request of any kind had been made of Respondent (R. 106). Barrels which belonged to Respondent's employer (R. 201, 205, 206, 209, 230) and which were known to be safe (R. 203) and which he had before used to stand on, were but a few feet away, by the side of the building—where Petitioner knew them to be (R. 101)—when he went away from them, that is in a different

direction than toward them, and "saw this barrel and went and got it" and "put it in its position without making any test of it at all" (R. 106). Petitioner walked away from the "dog" house and away from the barrels he had used before and walked toward the derrick to pick up the barrel of his selection. In doing so he did not contend he thought he was picking up the barrel which had supported his platform in derrick work of the day before (R. 92). Because of testimony that he exercised no care for his own safety, the Court of Appeals held: "* * * it is clear that he took no care whatsoever" and reversed and rendered judgment.

Because Petitioner was experienced in the work he was doing (R. 66) and testified he had knowledge of the every danger involved (R. 67, 68, 90) and offered no evidence in refutation of the testimony so given, and because Petitioner testified he did not need warnings (R. 68), the court held Respondent violated no duty and that Petitioner had voluntarily encountered the danger.

THE DECISION BELOW IS CLEARLY CORRECT

1. Respondent Violated No Duty It Owed to Petitioner

Petitioner was an employee of an independent contractor, not an employee of Respondent (R. 3). The duty to furnish Petitioner with a safe place to work was a duty imposed by law upon the contractor-employer Bars and no such duty was imposed upon Respondent. *Harrison v. Harrison (Tex. Civ. App. 1937, 100 S. W. 2d 780, at page 783;*

Mender v. Bryant (Tex. Civ. App. 1949), 225 S. W. 2d 877; 38 Amer. Jur. par. 18, page 661. Therefore there was no proper legal basis for the jury finding that Respondent had failed to provide Petitioner with a safe place to work. This was the only issue submitted to the jury on which verdict was to be permitted in his favor (R. 321-322).

At most, the duty owing by Respondent to Petitioner was the duty owing by an owner or occupier of premises to an invitee, that is, to warn of dangers of which it knew or should have known and of which the invitee (Petitioner) did not know or should not have known. No duty is imposed upon the employer of an independent contractor to give warnings to a contractor's employees of danger of which such employee knows. *McKee v. Patterson (Tex. Sup. Ct. 1954), 271 S. W. 2d 391,* numbered paragraph (2) pages 393-394.

Petitioner's testimony was that he had long and varied experience in doing the work being done (R. 66); that he knew of the dangers with which he became involved (R. 67); that he knew that if he did as he did around an empty kerosene barrel "it would probably blow you sky high" (R. 90). It was under these admissions that the court held that since Petitioner's "* * * own testimony, by which he is bound, clearly established that he was also aware of the danger involved * * * and * * * fully appreciated the danger * * * appellant (Respondent) breached no duty to him" (pages 10-11 Court's Opinion, third from last paragraph thereof).

2. The Doctrine of Volenti Non Fit Injuria is in Bar of Petitioner's Claim

The court below found that Petitioner's own testimony "by which he is bound, clearly established that he was also aware of the danger involved in using drums which might be found on the premises of an active drilling rig and that he fully appreciated the danger of using a cutting torch around a drum which had had either gasoline or kerosene in it, and yet he picked up a drum on the premises, concededly not in the identical place where he had previously left a drum, and used it without any examination whatever to determine its former contents and without even observing whether the openings therein were closed." (See R., pp. 67, 68, 90, 92, 101, 102, 103, 104, 105, 106, 107, 111, 112.) On these findings, the Court of Appeals concluded that Petitioner had made the choices which were made and voluntarily had encountered his danger.

In Texas, the law as declared by the Supreme Court of the state, is: "* * * one cannot recover for injuries sustained while voluntarily exposing himself to a danger which he either does or should fully realize and appreciate." *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391*, numbered paragraph 3, page 394. The Petitioner's admissions clearly establish the plea of voluntary exposure to and assumption of risk which was plead in bar of Petitioner's claim (R. 19, Ninth Defense).

3. Petitioner's Testimony that He Exercised No Care for His Own Safety Compelled the Court of Appeals to Find That It Was Petitioner's Negligence which Solely and Proximately Caused the Injuries He Received

Petitioner, in trial, unhesitatingly admitted that he exercised no care for his own safety (R. 102, 103, 104, 105). His testimony was clear and uncontradicted that he "went and got" the barrel of his choice (R. 106), all with actual knowledge that in the event he "lit a torch around a tank that had gasoline or kerosene in it, it would probably blow you sky high" and made no tests of it (R. 90, 68).

In Texas, the rule is that contributory negligence is an absolute defense in a case such as this. 30-B Tex. Jur., Par. 89, page 301. In Texas the rule also is that if a person "exercises no degree of care for his own safety, he may be said to be guilty of contributory negligence as a matter of law * * *." *Loughry v. Hodges (Tex. Civ. App., 1948), 215* S. W. 2d 669, paragraphs ('3-4') page 673, and other Texas cases cited by the Court in the Texas case cited in the opinion in this case [*United States Gypsum Co. v. Balfanz (5 Cir., 1951), 193 Fed. 2d 1*].

The Court of Appeals here properly followed the Texas law just as the court had followed the Texas law on the same subject in the *Balfanz* case just referred to and as they had found the Texas law to be in the more recent case of *Fain v. Goodyear Tire and Rubber Co., 5 Cir., 1956, 228 Fed. 2d 508, 511.*

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that the Court of Appeals decision is in conflict with the decision of the Supreme Court of Texas in *McKee v. Patterson, 271 S. W. 2d 391*, to which we have heretofore made reference. The decision under review exactly follows and does not differentiate from the *McKee* case.

In the *McKee* case Patterson, the injured workman, was an employee of a subcontractor who was working under McKee, a general contractor. Patterson, a painter, was working on a slick gymnasium floor when the ladder from which he was working slipped, causing the fall to the floor and his resulting injuries. Mr. Patterson knew of the slick condition of the floor and, as here, appreciated the danger of working on it.

There the court held, as the Court of Appeals held here, that when the parties have knowledge of danger there is no duty to give warning of the danger so known, *271 S. W. 2d ex. p. 394*. Likewise, the Supreme Court of Texas in that case held as the Court of Appeals held in this case that one who voluntarily exposes himself to risk cannot recover for the injuries sustained therefrom.

The court's statement, quoted in the ~~opinion~~ PETITION for writ of certiorari, "while he (an invitee) may not close his eyes to obvious dangers he has a right to assume that the premises are safe ~~from~~ FOR his use," *271 S. W. 2d (par. 4-5) ex. p. 395*, has application to the rule which determined whether an invitee, as a matter of law, *should have known* of the dan-

gerous condition to which he exposed himself. The Texas Supreme Court decision makes clear that such quoted rule has no application in the instances where the invitee had actual knowledge of the danger with which he became involved. The court there, as here, emphasized that the personal knowledge which the injured workman had of his danger would operate to bar his right of recovery.

THE COURT OF APPEALS DECISION IS NOT AN AN INVASION OF THE PROVINCE OF THE JURY

The evidence was without dispute that Petitioner's place of work was safe when it was delivered to the contractor as a place to perform the conversion work which was to be done (R. 77). The place of the work remained safe (R. 80, 81). Petitioner testified his place of work did not cause the accident (R. 81). Consequently, there was no fact question which required jury determination on the one issue submitted to the jury under Petitioner's lone theory for recovery (R. 321-322). Besides, and as above presented, Respondent, as the employer of an independent contractor, under the law, was not required to furnish Petitioner, a contractor's employee, with a safe place to work, *Harrison v. Harrison (Tex. Civ. App., 1937), 100 S. W. 2d 780*, nor was Respondent required to protect Petitioner from injury caused by transitory conditions incident to the progress of the work. *Union Tank & Supply Co. v. Kelley (5 Cir. 1948), 167 Fed. 2d 811.*

There was no need to warn Petitioner of danger. Petitioner testified that he knew how dangerous it was to do

what he did. Petitioner testified that warning to him was not required to acquaint him with the knowledge of his peril (R. 68). As has been above presented, no issue of fact was present as to whether or not Petitioner took any care for his own safety. He admitted that he had not (R. 106).

There was no evidence in support of liability of Respondent to Petitioner. The Court of Appeals properly held "the matter was not for submission to the jury but should have been disposed of by an instructed verdict." In that holding the Court of Appeals did not violate any right conferred to Petitioner by the Seventh Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

A copy of the foregoing Brief in Opposition has been deposited in the United States Mail in Midland, Texas, in a properly stamped envelope addressed to Counsel at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas; J. O. Bean, Esq., 10th Floor, Gulf States Bldg., Dallas 1, Texas; this the 14th day of September, 1956.

William L. Kerr

WILLIAM L. KERR

10/12

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NOV 8 1956
JOHN T. FEY, Clerk

No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1956

JOE GIBSON,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S PETITION FOR REHEARING

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S PETITION FOR REHEARING

Respondent, Phillips Petroleum Company, prays that this Court grant rehearing of its order of October 22, 1956 (granting the petition for writ of certiorari, vacating the judgment of the Court of Appeals for the Fifth Circuit, and reinstating the judgment of the District Court), and further prays:

(a) that said order be vacated, that the case be transferred to the summary calendar for oral argu-

ment, and that upon final hearing, the judgment of the Court of Appeals be affirmed; or, in the alternative,

(b) that said order be amended by directing that the case be remanded to the Court of Appeals for further proceedings; or, in the alternative,

(c) that said order be amended by directing that the case be remanded to the District Court for new trial; and

(d) that, in any event, said order be amended so as not to reverse that portion of the judgment of the Court of Appeals in favor of respondent as against Traders and General Insurance Company;

on the following grounds:

1.

We cannot help but believe that this Court summarily disposed of this case as being merely one in which the Court of Appeals substituted its opinion for that of the jury on disputed issues of fact. It is not such a case. The Court of Appeals did not decide the case merely on the ground of contributory negligence as a matter of law; as its opinion shows, the principal basis for its decision and judgment was that under applicable decisions of the State Courts of Texas, the respondent had violated no duty to petitioner, this being a clear matter of substantive law. If this Court is to take jurisdiction of this case involving only Texas

law, it is respectfully but most earnestly urged that this Court has not fully performed its judicial function by summarily vacating the judgment of the Court of Appeals. The per curiam order will create confusion as to the law to be applied in similar cases in the Federal District Courts in Texas. The order may be interpreted as a direction to the lower federal courts not to follow the decisions of the Supreme Court of Texas on this matter of substantive law. At the very best, if this case stands in its present form, the Federal Courts in Texas must speculate on what rule of law they are expected to apply as to the duty owed by a landowner to an employee of an independent contractor. This quite conceivably could lead to different rules in the Federal Courts and the State Courts of Texas and as among Federal Courts in Texas. Respondent respectfully submits that, if it is to take a case of this nature, this Court should permit the filing of briefs and hear oral argument and then hand down its opinion setting forth the reasons for its decision on the merits of the case; otherwise, courts and counsel in other cases will not know in what respects the Court of Appeals has or has not erred.

2.

Although the case is a personal injury damage suit involving no federal question, it does involve fundamental questions of legal duty which are of the utmost importance to lower courts in the federal system in deciding an ever-increasing volume of similar litigation brought by the employee of an independent contractor (after receiving

workmen's compensation benefits from his employer as petitioner did here) against the contractee for injuries arising out of performance of the contract work. The various legal relationships giving rise to an affirmative duty to protect or warn (e.g. master-servant, owner-invitee, supplier-user), the scope of such duty, and the proper limits to such duty are matters that have received the careful consideration of both the Texas appellate courts and the Court of Appeals for the Fifth Circuit. This Court's order does not indicate whether the law to be applied in the federal courts in Texas is to be different from the Texas law as declared by the Supreme Court of Texas in *McKee v. Patterson*, *271 S. W. 2d 391 (1954)*, and other cited cases; whether the law of that case is applicable to the facts of the present case, as the Court of Appeals held it was; whether, or in what respects, the Court of Appeals has misconstrued or misapplied that decision; or whether the judgment of the Court of Appeals is vacated for some other reason. The order invites, even necessitates, speculation as to what this Court intended to hold and causes confusion by upsetting an apparently correct and thoroughly considered published opinion of the Court of Appeals without discussion of either the law or the evidence. A specific example is afforded by a supplemental brief, filed in a Texas appellate court three days after this Court's order, stating that the United States Supreme Court, in reversing the *Gibson* case, "struck down the doctrine in the *McKee* case." (*Nance Exploration Co. v. Texas Employers' Ins. Assn.*, cause number 5226 pend-

ing on the docket of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas.)

3.

The decision of the Court of Appeals follows the Texas law on the questions presented and correctly applies the Texas law to the facts in evidence. The Supreme Court of Texas has not hesitated to render judgment for a defendant contrary to the jury verdict where the plaintiff's own testimony shows that he knew or should have known of the danger which caused his injury. *McKee v. Patterson*, supra. Nor has it hesitated to find contributory negligence as a matter of law. *Sergeant v. Williams, 258 S. W. 2d 787 (Tex. Sup. Ct. 1953)*. The Court of Appeals has rendered the same decision in this case as would have been rendered by the Supreme Court of Texas. Since the undisputed evidence shows that, as a matter of law, petitioner knew or should have known of the danger, there was no duty on respondent to warn him. Whatever might be the rule elsewhere, it is clear in Texas that this is a matter of substantive law on which the Supreme Court of Texas has spoken often and vigorously, as in the *McKee* case. Furthermore, petitioner's action is barred because he failed to exercise any care for his own safety and caused his own injury.

4.

The right of trial by jury does not require that effect be given to a verdict for the plaintiff that is contrary to the

plaintiff's own testimony, by which he is bound. The rule that the evidence must be viewed in the light most favorable to the verdict does not mean that the court should disregard the petitioner's own sworn admissions that, because of his experience in the oil fields, he knew that empty kerosene barrels were to be expected around any drilling well location (R. 67), that he knew it was dangerous to have a cutting torch around an empty kerosene barrel (R. 68) and that an explosion would probably occur (R. 68, 90), that he himself, and he alone, selected the barrel which exploded (R. 92), that he made no effort to determine the former contents of the barrel by either looking or smelling (R. 104), that he used the barrel without making any test of it (R. 106), showing that he exercised no care for his own safety. Lest there be any misunderstanding on this point, we repeat that petitioner himself testified that the barrel which exploded was selected and used by petitioner himself; that it was not the same barrel which respondent's employee had handed petitioner the afternoon before and which was a safe barrel; and that petitioner did not think at the time he selected the barrel or later that it was the same barrel he had been given the afternoon before (R. 92).

5.

If this Court's order is based on the duty of an employer to provide his employee a safe place to work, such as was involved in *Schulz v. Pennsylvania R. Co., 350 U. S. 523, 100 L. Ed. (Adv. Rep. No. 11), p. 430*, and *Anderson v. Atlantic Coast Line R. Co., 350 U. S. 807, 100 L. Ed. (Adv.*

Rep. No. 1), p. 47, then this Court has either misunderstood the undisputed facts here involved or has not followed the Texas decisions, because there was no employer-employee relationship between petitioner and respondent, and consequently, there could be no duty arising out of such a relationship. An entirely different duty is owed by an owner or occupier of land to an invitee upon the land. As stated by the Supreme Court of Texas in a recent decision, "The two fields of law are entirely separate, and they should be kept so." *Sears Roebuck & Co. v. Robinson, 280 S. W. 2d 238 (Tex. Sup. Ct. 1955)*. Petitioner has been paid compensation for his injuries as an employee of the contractor (R. 21). If he were respondent's employee, his action would be barred by the Workmen's Compensation Law of Texas. *Art. 8306, sec. 3, Vernon's Tex. Civ. Stats.; Bell v. Humble Oil & Ref. Co., 181 S. W. 2d 569 (Tex. Sup. Ct. 1944)*.

6.

If this Court's order is based on the duty of a supplier of a chattel for another's use to warn of its dangerous condition, *Restatement of Torts, sec. 388*, then this Court has affirmed the verdict and the District Court's judgment on a theory that was not submitted to the jury but was expressly rejected by the District Court and was not before the Court of Appeals. The complaint alleges that respondent was negligent in failing to furnish petitioner with reasonably safe equipment and in failing to warn petitioner of the unsafe condition of the drum (R. 5). The

District Court did not include this ground of recovery in the charge to the jury, and petitioner objected to the charge because of such failure (R. 328), such objection being overruled (R. 330). However, petitioner failed to appeal from the ruling and waived that alleged ground of recovery.

7.

The judgment of the Court of Appeals is correct for another reason which was not discussed in its opinion although point thereof was made before that Court. The only theory of liability submitted to the jury was failure to provide a safe place in which to work. The "place" of work was a perfectly safe piece of level ground. There is no evidence that it was unsafe. The condition of such place of work did not cause the accident. Petitioner himself testified that his place of work was safe (R. 77) and that the place of work did not cause his injury (R. 81). Yet, this Court's order reinstates the District Court's judgment which was based solely upon the jury finding that negligence in failing to provide a safe place of work was the cause of the injury (R. 321-322).

8.

The District Court's judgment that the intervenor, Traders and General Insurance Company (which had paid petitioner workmen's compensation benefits as the insurer of his employer), recover from this respondent the sum of $9,000.00, together with interest (R. 357), was reversed by the Court of Appeals, and that court rendered judgment

in favor of this respondent. Since Traders and General Insurance Company has filed no petition for writ of certiorari, this Court has no jurisdiction to reinstate the District Court's judgment in its favor.

9.

If this Court's order is not to be vacated, then it should be amended so as to remand the case to the Court of Appeals for further proceedings. Having rendered judgment on the grounds of no breach of duty and of contributory negligence, the Court of Appeals did not decide respondent's Point Two (proximate cause) or respondent's Point Five (erroneous charge). These points should be considered and decided before final judgment is entered. *Union Trust Co. v. Eastern Air Lines, 350 U. S. 962, 100 L. Ed. (Adv. Rep. No. 8), p. 307; Boudoin v. Lykes Bros. S. S. Co., 100 L. Ed. (Adv. Rep. No. 1), p. 48.*

10.

If the case is not to be remanded to the Court of Appeals, then it should be remanded to the District Court for new trial because of errors in the charge to the jury (see Brief for Appellant, Point Five, pages 36-38). The District Court instructed the jury to find for petitioner if they found that respondent failed to provide him a safe place in which to work (R. 321-322). Respondent objected to this instruction because it imposed a duty to warn and protect against dangers of which respondent did not know or which had not existed for sufficient time that it should have known

thereof (R. 331). *McKee v. Patterson*, supra. At best, the charge as a whole was confusing and contradictory. The District Court gave the jury conflicting versions of the law instead of reconciling the requested instructions and giving a clear and understandable charge, thus leaving to the jury the decision as to what rule of law to apply in reaching their verdict. Because of this error, the case should be remanded for retrial if the decision of the Court of Appeals is not affirmed.

For the above reasons, it is respectfully urged that this Court grant rehearing of its order and the further relief hereinabove sought.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

I further certify that a copy of the foregoing Petition for Rehearing has been deposited at Midland, Texas, in a United States Post Office, with first class postage prepaid, addressed to counsel of record for petitioner Joe Gibson at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas, and J. O. Bean, Esq., 10th Floor, Gulf States Building, Dallas, Texas, on this 7th day of November, 1956.

William L. Kerr

WILLIAM L. KERR

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No. 339

In the

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JOE GIBSON,

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PHILLIPS PETROLEUM COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE RECENT TEXAS COURT OPINION AS APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE RECENT TEXAS COURT OPINION AS APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

Respondent respectfully moves for leave to file the attached recent opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, as an appendix to respondent's petition for rehearing now pending in this case.

The opinion by the Texas court, which was rendered on November 21, 1956 (after filing of the petition for rehear-

ing in the case), supports the judgment of the Court of Appeals for the Fifth Circuit in this case in that the Texas court, applying the state law to very similar evidence, held that no fact issue was presented for jury determination.

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CERTIFICATE

I hereby certify that a copy of the foregoing Motion and the attached Appendix has been deposited at Dallas, Texas, in a United States Post Office, with first class postage prepaid, addressed to counsel of record for petitioner Joe Gibson at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas; and J. O. Bean, Esq., 10th Floor, Gulf States Building, Dallas, Texas, on this 27th day of November, 1956.

WILLIAM L. KERR.

APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

No. 5211

COURT OF CIVIL APPEALS

EL PASO

JAVIER OAXACA,

Appellant,

v.

R. D. LOWMAN, d/b/a R. D. LOWMAN, CONTRACTOR,

Appellee.

Appeal from the District Court of El Paso County, Texas

OPINION

This is an appeal from a summary judgment rendered in favor of the defendant (appellee) by the Forty-First District Court of El Paso County, Texas. Appellant, Javier Oaxaca, had filed his action for damages against appellee-defendant, basing his action on injuries received while working as a plumber for one N. M. Canfield. Canfield had a sub-contract under the general contract of appellee to construct certain buildings at Fort Bliss, Texas. The Texas

Employers' Insurance Association filed its petition as intervenor to recover the sum of $4,477.75, which represented the sum paid plaintiff (appellant) under workmen's compensation benefits. The facts are as follows:

Plaintiff, as employee of sub-contractor Canfield (who had a plumbing, heating and ventilating contract under the general contractor, R. D. Lowman), was engaged in replacing a joint of pipe in the building being constructed by the general contractor. In order to get up to where the pipe was being detached from the connection, plaintiff picked up a large, loose crate which had been left nearby by another sub-contractor. He, the plaintiff, turned this crate up on end, so that it was 8 feet high and about 18 inches thick, then climbed up a nearby ladder and stepped over on to the crate to receive the joint of pipe from an assistant, who was stationed up in the rafters, or beams. Plaintiff testified that he weighed 210 pounds, and the piece of pipe weighed approximately 50 pounds. While standing on this crate, which the plaintiff says was empty, and while handling the piece of pipe, the crate tipped over and he fell, sustaining injuries of which he complains.

Defendant filed his motion and affidavit for summary judgment. Depositions of plaintiff and defendant's superintendent were filed. The court granted this motion. After the summary judgment had been granted, plaintiff filed a motion for a new trial and attached an affidavit thereto.

Appellant charges error, stating that the trial court erred in finding and holding, as a matter of law, that there

was no genuine issue, except as to the amount of damages, as to any material fact, and that defendant-appellee was entitled to judgment as a matter of law.

We think that appellant's point of error must be overruled. This being a summary judgment case, we are obliged to give the evidence and the inferences therefrom the most favorable aspect reasonably possible with reference to plaintiff's case, and discard contrary evidence and inferences. Even so, we feel that the reasoning and rulings found in *Robert E. McKee, General Contractor, Inc. v. Patterson, 271 S. W. 2d 391*, controls the disposition of the cause before us.

Plaintiff urges that because the general contractor was required by his contract to keep the premises free and clear from rubbish and debris, that he was, therefore, liable to plaintiff because another sub-contractor had left this crate on the premises. We find that the presence of the empty crate, even though it may have been left for two days or more, under the circumstances did not proximately cause the plaintiff's injuries. As is evident from the record and the depositions filed therein, the plaintiff preferred to pick up, move over into position, and use the crate, rather than use a ladder and a movable scaffold that were nearby and available and were there for the purpose of being used as needed. The proximate cause of plaintiff's injuries, then, was his deliberate and calculated rejection of the movable scaffold and putting to an unintended and unforeseeable use the empty crate. The record shows that plaintiff testified that it would have taken a little longer to take down

and use the movable scaffold, so instead he picked up the empty crate and, after some discussion between himself and a workman named Puga, stationed upon the beams or rafters, decided that the crate would serve his purpose; and, although he, the plaintiff, assured Puga that the crate was safe, he did ask one Rivera, another workman, to hold it while he was up on it. It cannot be said, then, that the proximate cause of plaintiff's injuries was the mere presence of the crate. It was the unusual and unforeseeable use to which plaintiff put it. In other words, plaintiff had a safe place to work, but deliberately rejected it.

Nor could the general contractor have foreseen that the crate would be put to any such use as was done by plaintiff. His affidavit shows that plaintiff's immediate employer (sub-contractor) was required to furnish the necessary scaffolds and ladders for his men. The record shows that such was available, but was rejected by plaintiff after an intelligent and considered choice. Therefore, we do not think the results could have been reasonably foreseen by general contractor.

It is also obvious from the record that the danger in using the crate in the way he did was as obvious to plaintiff as it could have been to defendant, the general contractor. This was not a concealed danger, as was found in the *Henger* case *(Smith v. Henger, 226 S. W. 2d 425)*. Plaintiff in his deposition reveals that he had considered the danger in using the crate and had tried to alleviate it, at least to some extent, by having the workman, Rivera, stand at the bottom of the crate and hold it steady; so here

we have a risk that is as open and obvious to the plaintiff as it could be or was to the general contractor.

It is also inescapable, due to the circumstances here present, that plaintiff here deliberately and voluntarily assumed the risks attendant to using the crate in the manner he did. Nobody told him to do it, and his deposition shows that he discussed it with the workman who was up in the rafters or beams. Plaintiff's injuries did not result from the passive presence of a hazard similar to the elevator shaft, in the *Triangle Motors* case *(Triangle Motors of Dallas v. Richmond, 258 S. W. 2d 60)*, or the presence of the shaft in the *Henger* case. Plaintiff here, by his own affirmative action, created his own hazard and then voluntarily assumed the risks attendant thereto.

Lastly, it is clear that plaintiff, by creating his own hazard and then using it, was guilty of contributory negligence as a matter of law. The scaffold was nearby and available; the risk was open and obvious to plaintiff; and yet he rejected the scaffold, prepared the crate for the use to which he put it, and, after discussion as to its safety, climbed up on it and was injured while thereon.

Having found that there were no genuine issues of fact presented by the record, it follows, therefore, that the trial court was correct in granting summary judgment in favor of the defendant:

James v. M. K. & T. R.R. Co., 182 S. W. 2d 921;

Robt. E. McKee, Gen. Cont., Inc. v. Patterson, 271 S. W. 2d 391;

Smith v. Henger, 226 S. W. 2d 425;

Triangle Motors of Dallas v. Richmond, 258 S. W. 2d 60.

The affidavit filed by plaintiff, and attached to his motion for a new trial, came too late, as the court is charged with the duty only of considering the record as it appears before the court at the time of the hearing of a motion for summary judgment:

Rule 166-A, Texas Rules of Civil Procedure;

Haley v. Nickels, 235 S. W. 2d 683;

Fowler v. Tex. Emp. Ins. Assn., 237 S. W. 2d 373.

Appellant's point is therefore overruled, and the decision of the trial court in all things affirmed.

/s/ ALAN R. FRASER

Alan R. Fraser, *Associate Justice*

Filed: Nov. 21, 1956.

OCTOBER 22, 1956.

Decisions Per Curiam.

No. 339. GIBSON *v.* PHILLIPS PETROLEUM CO. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the judgment of the District Court is reinstated. MR. JUSTICE REED and MR. JUSTICE BURTON would deny certiorari. MR. JUSTICE FRANKFURTER has filed a dissent in which MR. JUSTICE HARLAN joins. *Henry D. Akin, Jr.* for petitioner. *Rayburn L. Foster, Harry D. Turner* and *William L. Kerr* for respondent. Reported below: 232 F. 2d 13.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting.

This is an ordinary suit for damages for injuries claimed to have been caused by defendant's fault. Doubtless hundreds upon hundreds of such suits are constantly brought in the state courts of Texas. This suit is brought in a federal court because the plaintiff is a citizen of Texas and the defendant corporation is, in the eyes of the law, a citizen of Delaware. The federal court in a case like this is deemed to be a state court of Texas,* and the law by which the plaintiff's rights are to be determined is exclusively Texas law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. No federal law, statute or decisional, is remotely involved. These diversity litigations place, it is becoming increasingly recognized, an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in

*". . . a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . ." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108.

the federal courts. Very often litigants in the position of the plaintiff bring a suit involving merely local law in a federal court because for one reason or another they expect a more favorable outcome than if the suit were tried in the local courts. See *Lumbermen's Mutual Casualty Co.* v. *Elbert*, 348 U. S. 48, 53 (concurring opinion).

This case was tried before a jury, which found for the plaintiff. Defendant appealed to the Court of Appeals for the Fifth Circuit. While the particular judges who heard the case are not from Texas, they are, however, constantly charged in such cases as this with the task of being conversant with, and applying, Texas law. The Court of Appeals held that, as a matter of Texas law, the District Court committed error in not directing a verdict for the defendant. It reversed the judgment of the District Court and rendered judgment for the defendant. Plaintiff then sought a writ of certiorari to review the judgment of the Court of Appeals.

This Court cannot determine whether the Court of Appeals was right or wrong in its judgment without determining whether on this record the case should or should not have been left to the jury. That can only be decided on the basis of an investigation of Texas law. This Court is not a court to determine the local law of the forty-eight States. Error on the part of a Court of Appeals in applying the local law of any one of the forty-eight States involves injustice to a particular litigant, whether it is a personal injury case or any other case. If the claim of injustice in a particular case arising solely out of diversity jurisdiction justifies review by this Court, it justifies it in every case in which on a surface view of the record this Court feels a Court of Appeals may have been wrong in its ascertainment of local law.

In taking one of these cases, encouragement doubtless is given to seek this Court's review in other like cases.

But Congress sought to relieve this Court of the burden of such cases when it established the Courts of Appeals in 1891. This Court has respected the purpose of that enactment by stating again and again that it does not sit to correct errors, even a plain error, in a particular case, especially one involving a local controversy of this sort. The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measure in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court; it should not be diverted by the correction of errors in local controversies turning on particular circumstances.

The Court's consideration of a case like this and the encouragement given for similar demands upon the Court are, in my deep conviction, so inimical to the effective discharge of the true functions of this Court that I cannot abstain from expressing my dissent from the Court's entertainment of the petition for certiorari.